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Utah Supreme Court

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Henry L. Adams; Attorney for Defendant and Respondent;

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IN THE SUPREME COURT OF THE

STATE OF UTAH

FILED

SEP 12 1980

STATE OF UTAH, :

Plaintiff and :
Appellant, :

Clerk, Supreme Court, Utah

Case No.

vs. :

9258

SHERRILL Z. CHESNUT, :

Defendant and :
Respondent. :

BRIEF OF RESPONDENT

HENRY L. ADAMS

Attorney for Defendant and Respondent

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IN THE
SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)
Plaintiff and Appellant,) Case No.
vs.) 9258
SHERRILL Z. CHESNUT,)
Defendant and Respondent.)

BRIEF OF RESPONDENT

To the Honorable Chief Justice, and
to the Associate Justices of the Supreme
Court of the State of Utah:

The respondent respectfully answers
the brief of the appellant. The respon-
dent accepts as his own the appellant's
Statement of the Case and Statement of
Facts.

STATEMENT OF POINTS

POINT I

THE STATE, IN ATTEMPTING TO APPEAL FROM AN ORDER DENYING THE STATES MOTION FOR AN ORDER TO SHOW CAUSE, IS APPEALING FROM AN ORDER NOT YET SUBJECT TO REVIEW BY THE SUPREME COURT UNDER THE UTAH CONSTITUTION, ARTICLE 8 SECTION 9.

POINT II

THE STATE'S MOTION, ON ITS FACE, DID NOT STATE GROUNDS ON WHICH AN ORDER TO SHOW CAUSE COULD ISSUE AND, THEREFORE WAS PROPERLY DENIED.

a. MOTION DID NOT SHOW VIOLATION OF THE TERMS AND CONDITIONS OF PROBATION.

b. THE TERMS AND CONDITIONS OF PROBATION SHOULD NOT BE ENLARGED SUBSEQUENTLY TO THE TIME THEY ARE

IMPOSED BY THE ORDER OF THE COURT
TO INCLUDE A PARTICULAR COURSE OF
CONDUCT OF THE PERSON ON PROBATION.

ARGUMENT

POINT I

THE STATE, IN ATTEMPTING TO APPEAL
FROM AN ORDER DENYING THE STATE'S MOTION
FOR AN ORDER TO SHOW CAUSE, IS APPEALING
AN ORDER NOT YET SUBJECT TO REVIEW BY THE
SUPREME COURT UNDER THE UTAH CONSTITUTION,
ARTICLE 8 SECTION 9.

The state in this case is basing its
right to appeal under Section 77-39-4,
U. C. A. 1953 which states that an appeal
may be taken by the state:

"(3) From an order made after
judgment affecting the substantial
rights of the state. ..."

This statute, however, must be con-
sidered in light of the constitutional

provision of the Utah Constitution,
Article 8 Section 9 which states, in part:

"From all final judgments of
the district courts, there shall be
a right of appeal to the Supreme
Court."

The statute cannot, then, be construed as enlarging the basis for appeal to the Supreme Court beyond the constitutional provision as only an amendment to the constitution could accomplish this.

If the order of the district court on which the state bases its appeal was not a 'final judgment' within the meaning of the Constitution, the Supreme Court has no jurisdiction to review at this time.

The question essentially is what is a 'final judgment'? In *Shurtz v Thorley*, 90 Utah 381, 61 P2d 1262, 1264, the court said:

"A judgment, to be final, must dispose of the case as to all the parties, and finally dispose of the subject-matter of the litigation on the merits of the case."

Also, in *Kourbetts v National Copper Bank*, 71 Utah 232, 264 Pac. 724, 725, a final judgment is said to be one that:

"terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined."

And in *Oldroyd v McCrea* 65 Utah 142, 235 P 580, the court said:

"Under our Constitution and Statute an appeal lies only from a final judgment. This court in numerous cases has held that a judgment to be final for purposes of an appeal must dispose of the case as to all of the parties and finally dispose of the subject matter of the litigation on the merits, or be a termination of the particular proceeding or action, or, as sometimes expressed, the case put out of court."

And the court, through Justice Wolfe, in

Attorney General of Utah v Pomeroy, 93

Utah 426, 73 P2d 1277, 1286, said:

"The paramount policy of the law is to permit litigants to obtain review of the rulings of trial courts. There is another policy almost equally potent, that is, that cases shall not be appealed piecemeal or in installments."

While none of these cases attempt to say specifically what orders are final and therefore appealable, they do attempt to lay down the considerations and policy on which it may be determined whether an order is final for purposes of appeal.

In the case of Attorney General of Utah v Pomeroy, supra, and subsequent cases, this court has attempted to make clear that a strictly literal interpretation of the constitutional provision relating to appeals was improper and that some orders may operate in such a manner that an appeal is the proper and, possibly,

the only remedy a litigant may have if he is to be relieved of some 'palpable or irremediable injustice'.

The interpretation now seems to be that if the district court has jurisdiction of a matter, an appeal should not be made available from every order of the court as it would unnecessarily prolong the action. It is better to have the remedies of the district court exhausted and then on appeal all alleged errors could be corrected or reviewed. As Justice Crockett stated in *Olsen v District Court of the Second Judicial District*, 106 Utah 220, 147 P2d 471, 473:

"The proper and orderly procedure requires that when a court has jurisdiction of the suit, it should go ahead and complete the litigation. When this is accomplished, an appeal can be taken so that the appellate court may then review all alleged

errors in one proceeding. This orderly process should not be interfered with, unless it is urgently necessary to prevent some palpable and irremediable injustice."

In the present case it is conceded that the district court had jurisdiction over the defendant by virtue of its order for probation. The statute, 77-35-17, contemplates that the defendant should remain under the jurisdiction of the district court and it is clear that probation was granted by virtue of this statute. The order denying the state's motion for an order to show cause did not end that court's jurisdiction nor did it place the defendant out of the control of the court. The effect of such an order was merely to say that the state's motion on its face stated no grounds on which such an order could issue. It was and is

necessary for the state to proceed in a different manner until they have, in the words of our leading cases 'finally disposed of the subject-matter of the litigation' or the 'case put out of court' before the matter is ripe for appeal.

The state has not attempted to exhaust ^a its remedies at the district court level as is impliedly advised in our past court decision but attempts to appeal from an order which does not possess the finality required by the state constitution and case law.

Some of the orders which have been held not subject to appeal include an order granting or denying a motion for a new trial, *White v Pense* 15 Utah 170, 49 Pac. 416; *Nelson v Southern Pacific RR* 15 Utah 325, 49 Pac. 644; *Eastman v Curry*

14 Utah 169, 46 Pac. 828; Stubbs v Third Judicial District Court, 106 Utah 539, 150 P2d 783; Candland v. Mellen, 46 Utah 514, 151 Pac. 341; also, orders dismissing a complaint; Robison v Fillmore Commercial and Savings Bank, 61 Utah 368, 213 Pac. 790; and orders of non-suit, Lukich v Utah Construction Company, 46 Utah 317, 150 Pac. 298.

The question becomes one of how does the lower court's order in the present case fit within the general classification of those listed above and, therefore, is not appealable. One of the important aspects of the cases listed above and the cases attempting to define, generally, what is an appealable order is that no disposition is made on the merits of the case. The court in making its order overruling the State's motion made no

determination as to the actual merits of the case but based its order on Jurisdictional grounds; that is, the motion itself did not state facts sufficient to give the lower court jurisdiction over the matter. Another aspect to be considered in determining whether an order possesses the finality required by the state constitution and statutes is whether the parties by virtue of the order are placed in a position different from their original position and, if so, can they be placed in their original position. If not, then an appeal should lie for the order is final enough to put the parties in a position different from the one they were in originally and one from which they cannot extricate themselves. In the orders of the cases listed above and the present order, the parties have not been dislodged of their original positions.

Before the state's motion was denied, the state was in a position to move for commitment to prison if a violation of the terms and conditions occurred and they still may do so; prior to the court order, the state was in a position to move to have the terms and conditions of probation modified, amended or made more definite and they still may do so. The position of the state has not changed and the defendant's position remains the same--he is still within the jurisdiction of the lower court and still under the terms and conditions imposed by that court; he may be committed to the state prison if he is shown to have violated the orders of that court.

This order is similar to those listed above for another reason. In the cases listed above, each time there is another

avenue ⁴among which the party may proceed; i.e. the filing of a new complaint which does state a cause of action, the filing of an amended complaint, or an appeal from the original judgment. In the instant case the state, had an alternative, also. It could have moved under 77-35-17, U. C. A. 1953, to have the terms and conditions of probation modified; it could have asked the court for an order detaining more particularly the terms and conditions of probation and the record shows that it did request the court to include certain language when the court made its order granting probation, or ti could have filed a new motion setting forth facts which indicated that a term or condition of probation had been violated, or it could have prosecuted on the alleged offense. And, further, even though the state has found it

necessary to attempt an appeal in this particular case, the alternative remedies above remain available to them.

The order of the lower court does not possess the qualities of a 'final judgment' and should not be made appealable.

It is contended that review is not now properly before the court and it should refuse to entertain the appeal on jurisdictional grounds.

POINT II

THE STATE'S MOTION, ON ITS FACE, DID NOT STATE GROUNDS ON WHICH AN ORDER TO SHOW CAUSE COULD ISSUE AND, THEREFORE, WAS PROPERLY DENIED.

a. MOTION DID NOT SHOW VIOLATION OF THE TERMS AND CONDITIONS OF PROBATION.

b. THE TERMS AND CONDITIONS OF PROBATION SHOULD NOT BE ENLARGED SUBSE-

QUENTLY TO THE TIME THEY ARE IMPOSED

BY THE ORDER OF THE COURT TO INCLUDE
A PARTICULAR COURSE OF CONDUCT OF THE
PERSON ON PROBATION.

The second contention of respondent concerns itself with the original order of the district court imposing the terms and conditions of probation and the failure of the state to show violation of such terms and conditions.

The brief of appellant (P.3) and the record on appeal (R.22-23) both disclose the order of the court in suspending sentence and placing respondent on probation. Essentially, the court imposed three conditions; to wit:

(1) That respondent remain in the strict custody and supervision of his bondsman, Jack McCarthy.

(2) That respondent remain outside

(3) That the respondent report to the court on his stay date, March 14th.

The fact that respondent was placed on probation pursuant to 77-35-17, U. C. A. 1953 of the Utah Statutes imposed no conditions other than those incorporated in the order of the court to which reference has been made. The statute reads in part as follows:

"Upon a plea of guilty on conviction of any crime or offense, if it appears compatible with the public interest, the court having jurisdiction may suspend the imposition or the execution of sentence and may place the defendant on probation for such period of time as the court shall determine.

"The court may subsequently increase or decrease the probation period, and may revoke or modify any condition of probation. While on probation the defendant may be required to pay, in one or several sums, any fine imposed at the time of being placed on probation; may be required to make restitution or reparation to the aggrieved party or parties for the action, damages or losses caused by the offense

to which the defendant has pleaded guilty or for which conviction was had; and may be required to provide for the support of his wife or others for whose support he may be legally liable. ..."

At no place does this statute attempt to impose the terms or conditions of probation, it only lists certain situations which may arise and attempt to cover them. As the statute provides no conditions or terms for the probationer to follow, the court must itself impose the terms and conditions it deems advisable in a particular case. It is well known that often the court will place a probationer under the control of the adult probation and parole department and require that he follow the conditions imposed by them. In this situation it is often required, that he sign a statement acknowledging that he has been apprised of the type of conduct expected of him by the probation department and, through them, the court.

It is considered to be the better rule that the terms and conditions be specific and incorporated in the order of the court when it grants probation.

In *Ex Parte Hamm* 172 Pac. 190, LRA 1918D, 694 the court of New Mexico was concerned with a problem similar to ours in this case. There the defendant had been sentenced for violation of the New Mexico gambling law. The sentence was suspended on 'good behavior'. Later the state sought to have the probation revoked on the grounds that the defendant had been involved in gambling activities. The Supreme Court on appeal made the following statements:

"Restrictions upon the conduct of one convicted of a criminal offense and upon whom sentence has been suspended should be specified in the order of suspension where, by statute, the court has broad power to determine in each particular case the terms upon which sentence shall be suspended..."

"The district court evidently believed that the petitioner when the sentence was suspended promised him that he would quit gambling, but the order of suspension contains no such restriction upon petitioner's conduct. The court speaks only through its record, and this record is what this court must act upon. If the district court desired to enforce this restriction as one of the conditions of the suspension of the sentence, the order should have so specified."

"It should be observed in this connection that no fine distinctions are to be drawn for the purpose of curtailing the discretion and powers of the district courts in these matters. All that we hold is that, if restrictions upon the conduct of defendant are to be imposed, they must be specified in the order of suspension."

This is, perhaps, the clearest state-

ment we have dealing with the problem and expresses the view respondent believes should be adopted by this court. New Mexico, however, has one later case which, while we do not believe it affects the case before the court, should be mentioned. In *Ex Parte Selig*, 223 Pac. 98, 29 N.M. 430, the Supreme Court once again stated that the

terms and conditions must be prescribed by the court:

"... it leaves it entirely with such courts to determine for themselves the terms and conditions upon which a sentence in each case may be suspended: But a careful consideration of the language used by the legislature leads to but one interpretation, namely, that it does require the court to set forth in such an order the terms and conditions upon which the sentence is suspended..."

The court then went on to say that as the petitioner had been apprised of the conditions of probation prior to the order suspending sentence, was represented by an attorney, it was upon him to ask for more particular terms and conditions to be included in the order. This holding is questionable, at best, as the New Mexico court recognized that the statute contemplated that the terms and conditions should be incorporated in the order of suspension. Nevertheless, we think our case falls without this holding for several reasons, the main

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one being that certain definite terms and conditions were imposed by the order. The court having made an order containing the terms and conditions of probation, should the defendant be required to ask the court to impose other or different terms. We think not. The court is permitted in its discretion to impose the terms it finds proper and if the defendant were to object to them it is highly improbable they would be removed; why then should he be required to have more terms and conditions imposed by the court once the court has made its determination of what terms and conditions of probation are suitable.

As indicated, we believe this case fits within the policy of the New Mexico cases above but falls outside the holding of Ex Parte Selig on its facts alone and, also, on the grounds that the holding of ex Parte Selig is not clear and should be limited to the facts of that case.

The Supreme Court of Idaho has had an opportunity to consider the problem with which we are concerned and seems to have accepted the position advanced by the respondent here.

In *Ex Parte Medley*, 73 Ida. 474, 253 P2d 794, the court was concerned with a person whose probationary status the state sought to revoke. There the court said:

"Here, it appears that it is the duty of the judge at the outset to inform the defendant as to the conditions and terms of his probation and to instruct and advise him of the conduct expected on his part. While great latitude is vested in the judge in these respects in that he may fix such terms and conditions as he in his sound discretion deems necessary and expedient, yet there must be terms and conditions set forth. This court has held that the statute requires that the terms upon which judgment is withheld be made a part of the order in writing..."

And this court itself has hinted at the proposition that the terms and conditions of probation should be clearly set out. In *Baine v. Beckstead*, __Utah__, 347 P2d 554, 558 the court stated:

"...for this purpose (speaking of the probationary status) the defendant is required to agree to specified standards of conduct...the freedom he enjoys is limited and is subject to revocation for violation of the prescribed conditions." (emphasis ours)

We have already referred to the terms and conditions of probation in the instant case. The state's motion on which it sought its order to show cause did not allege that the respondent failed to remain in the custody and supervision of his bondsman, nor did it allege that respondent had returned to Sevier County, nor did it allege that respondent failed to appear on March 14. These were the only terms imposed by the court and if the state's motion failed to allege a violation of one of these items, their motion, on its face, failed to establish grounds for the district court to enter an order to show cause why the probation should not be revoked.

While the court may under 77-35-17, U.

of probation, this should be done only on proper application. It is not within the court's power to modify or change the conditions of probation, so that it will cover an act, the commission of which did not violate at the time any of the specified terms of probation. The specification of the terms and conditions of probation becomes important at this point for if the state is permitted to proceed with its motion and order they will seek to have the court impose a new condition of probation and contend that such a condition was impliedly part of the original order of the court conferring probation upon the respondent.

It may be said by the state that the respondent well knew he was not to commit the act on which the state based its motion below whether or not it was a specific condition of probation. While we concede that one should know the difference between right

and wrong, we do not agree that this is one of the implied conditions of probation but contend that the conditions of probation must be specific and incorporated in the order of the court. If we might be permitted an indulgence, let us consider a few situations which could occur. Suppose the respondent had gotten intoxicated; suppose he had been found to be away from home at three o'clock in the morning; suppose he was frequently in the company of ex-convicts; suppose he was arrested and convicted of driving without a valid driver's license. It is contended that none of these acts would violate the terms and conditions of probation which were imposed in the instant case. While it may be argued that the nature of the specific act complained of here is more serious, it should not be forgotten that basic principles of justice and law are controlling. ~~In the~~ ^{In the} propositions above, if

there is no violation of the terms and conditions of probation, equal application of the law requires a finding and holding by the court that there is no violation in the actual case before the court and that the lower court was correct in denying to issue the order to show cause demanded by the state.

Should the lower court be ordered to issue the order requested, it would, of necessity, be ordered to impose new conditions and terms of probation. While we concede that the court may impose new conditions, this should be done only on proper application and through proceedings designed to accomplish this purpose. The state should not be permitted in this case to use an abortive procedure to have the terms and conditions of probation changed and at the same time, possibly, send respondent to prison for violation of a con-

dition of probation not existing at the time he allegedly committed the act complained of by the state in its motion below.

CONCLUSION

The state in the instant case is attempting to appeal from an order not yet subject to appeal under the existing constitutional provision and case law of the State of Utah. The Supreme Court is thus deprived of reviewing at this time as the matter is not properly before the court. Further, the terms and conditions of probation for respondent were clearly set forth in the order of the court below. If they do not cover the instant situation, it is upon the parties having an interest in this matter to have the terms and conditions altered and modified to be more comprehensive. The district court has authority to do this pursuant to the statutes conferring authority upon the district courts to grant probation.

Respectfully submitted,
Henry L. Adams
Attorney for respondent.

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